IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

MARK FITZHENRY,

Plaintiff,

vs.

FESTIVA DEVELOPMENT GROUP, INC., HERBERT H. PATRICK, JR., Individually, dba as Festiva, ETOURANDTRAVEL, INC.,

Defendants.

C/A No.: 2:16-cv-3725-DCN-BM

DEFENDANTS' NOTICE OF MOTION, MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendants Festiva Development Group, Inc., Herbert H. Patrick, Jr., Individually, dba Festiva, ETOURANDTRAVEL, Inc. ("Defendants"), by and through their undersigned attorneys, hereby file this Notice of Motion, Motion and Memorandum in Support of Motion to Dismiss against Plaintiff Mark Fitzhenry ("Plaintiff").

I. INTRODUCTION

Plaintiff's case should be dismissed because he fails the United States Supreme Court's test for Article III standing to bring this lawsuit, as set forth in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016). In Plaintiff's Complaint, the requisite allegations of "concrete and particularized" harm, traceable to each alleged violation of the Telephone Consumer Protection Act ("TCPA"), are missing. Indeed, Plaintiff has not identified any alleged injury under the TCPA. His failure to demonstrate actual injury based on the one telephone call alleged is fatal to his ability to establish standing. Accordingly, Plaintiff's complaint should be dismissed with prejudice.

Specifically, Plaintiff asserts one cause of action under the TCPA. He claims that "Defendants directly and/or by their agents or other entities . . . did initiate the telephone call(s) alleged herein with an automatic telephone dialing system and/or an artificial or prerecorded voice message." (Complaint at ¶ 14). The one telephone call identified by Plaintiff allegedly occurred "on or about July 29, 2016." (*Id.* at ¶20). Plaintiff further alleges that he did not give prior express written consent for the call and did not solicit the call. (*Id.* at ¶¶ 21, 22). Notably, Plaintiff appears to equivocate on the actual date the alleged call was made, when he alleges "on or about" July 29, 2016. Additionally, Plaintiff does not allege whether he actually received or answered the call. More importantly, however, Plaintiff does not allege that he suffered any harm or damage from the call. Nevertheless, based on the allegations, Plaintiff seeks statutory damages of $500 per alleged violation of the TCPA, as well as treble damages. (*Id.* at ¶¶ 30, 31). These allegations are insufficient, as a matter of law, to confer standing on Plaintiff to bring this action.

II. ARGUMENT

As the party seeking to invoke the jurisdiction of this Court, Plaintiff bears the burden to "clearly allege facts demonstrating" his standing to bring this suit. *Warth v. Seldin*, 422 U.S. 490, 518 (1975). Thus, Plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing is properly raised in a Rule 12(b)(1) motion to dismiss. *See White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005) (quoting *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)) ("When a defendant raises standing as the basis for a motion under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction . . . the district court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.").

Injury in fact is the "[f]irst and foremost" of the three elements of standing. *Spokeo*, 136 S. Ct. at 1547 (citing *Steel Co. v. Citizens for Better Environment*, 521 U.S. 83, 103 (1998).) Indeed, "[i]njury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo*, 136 S. Ct. at 1547-48. Plaintiff must show that he suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* (citing *Lujan*, 504 U.S. at 560.)

For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548. For example, in *Spokeo*, the violation of plaintiff's statutory rights and his individualized, personal interests in the handling of his credit information constituted "particularized" issues. *Id.* In contrast, "[a] 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Id.* (citing Black's Law Dictionary 479 (9th ed. 2009).) A "concrete" injury is "real," and not "abstract." *Id.* Therefore, a plaintiff does not "automatically satisfy[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 136 S. Ct. at 1549.

Importantly, under the TCPA, Plaintiff must establish standing for each alleged violation—in other words, he must establish an injury in fact that was caused by each individual call. *Romero v. Department Stores Nat'l Bank*, No. 15-CV-193-CAB-MDD, 2016 WL 4184099, *3-5 (S.D. Cal. Aug. 5, 2016)(court determined no standing where Plaintiff failed to tie her alleged injuries to any of the alleged 290 total calls made in violation of TCPA, just two of which she answered); *see also Davis v. Fed. Elec. Comm'n*, 554 U.S. 724, 734 (2008) (quoting

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006)) ("'[A] plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief that is sought.'").

In his complaint, Plaintiff fails to allege sufficient facts to satisfy these constitutional standing requirements. Indeed, Plaintiff has failed to allege any harm, let alone particularized harm. Absent allegations of any particularized, concrete harm resulting from the one call identified by Plaintiff, Plaintiff lacks Article III standing to bring his TCPA claim. Accordingly, Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(1).

III. CONCLUSION

For the foregoing reasons, Defendants respectfully requests that the Court grant their Motion to Dismiss and dismiss the Complaint with prejudice.

s/ Molly Hughes Cherry

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November 23, 2016
Charleston, South Carolina

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing DEFENDANTS' NOTICE OF MOTION, MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS has been served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 23rd day of November, 2016.

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